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Anti-Trust—Sherman Act—Price Fixing—Refusal to Deal.—Klein v. American Luggage Works, Inc.

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courts are justified in assuming that there is a difference between sections 1 and 14, it appears that the difference they have selected is one strictly picked out of the air and based on, at best, a very disputable congressional history. The Supreme Court acted wisely in putting a sound and just finale on a formalistic argument and furthered the progress of anti-trust laws rather than giving them a crippling blow as they might have done.

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Anti-Trust—Sherman Act—Price Fixing—Refusal to Deal.—***Klein v. American Luggage Works, Inc.***[1]—The plaintiff Klein, a retailer brought this private anti-trust action[2] against, American Luggage Works, a manufacturer, John Wanamaker Philadelphia, Inc. and Strawbridge & Clothier, competing retailers, for treble damages for injuries resulting from a conspiracy in violation of the Sherman Act.[3] The conspiratorial violation was "alleged to be a resale price maintenance scheme implemented by the sanction of the defendant manufacturer's refusal to deal."[4] HELD: The manufacturer, American, would be enjoined from refusing to supply the plaintiff pursuant to the price fixing conspiracy and American, Wanamaker and Strawbridge were liable in treble damages as co-conspirators.

American's policy was to show catalogues to its new and prospective customers with suggested retail prices, and preticket each individual item of luggage with a tag indicating the suggested retail price. Prospective dealers not desiring to conform to the prices were denied supply. Each dealer was informed that compliance with the catalogue and preticketed price was mandatory, and that non-compliance would result in termination, after an investigation by an American representative. Klein was discounting American Luggage for which he was repeatedly admonished by American's salesman, who was responding to complaints from both Wanamaker and Strawbridge sales clerks and inquiries by buyers from Wanamaker and Strawbridge. Klein's supply was stopped one week after a visit to his store by American's President who later refused to reinstate Klein without assurances that the suggested retail prices would be followed.

Against this factual background the court applied the principles found in the *Colgate* and *Parke Davis* decisions.[5] Prior to *Colgate* the Supreme Court held in *Dr. Miles Medical Co. v. Park & Sons Co.*[6] that contracts by which dealers were to sell at agreed prices were illegal under the Sherman Act. The celebrated *Colgate* case followed in which, because it came to Court on the sufficiency of the indictment, the Court stated: "And we must conclude that as interpreted the indictment does not charge Colgate & Company with selling its products to dealers under agreements which obligated the latter not

1 Civil No. 2067 (D. Del. June 15, 1962), Trade Reg. Rep. ¶ 70,355.

2 Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. §§ 15, 26, 38 (1958).

3 Id. § 1: "Every contract, combination, in form of trust or otherwise or conspiracy in restraint of trade . . . , is declared to be illegal. . . ."

4 Klein v. American Luggage Works Inc., supra note 1, p. 76,425.

5 United States v. Colgate & Co., 250 U.S. 300 (1919); United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

6 220 U.S. 373 (1911).

to resell except at prices fixed by the Company." The Court went on with the statement that is the root of the *Colgate* doctrine:

> In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.[7]

Immediately, *United States v. Schraeder*[8] was before the Court and, in reversing a lower court, the Supreme Court summarily made a clarification of *Colgate* by reinjecting the notion of agreement into the doctrine.[9]

This was followed by the *Beech-Nut*[10] case which has been accepted as a limitation on the *Colgate* doctrine.[11] The case was prosecuted under the Federal Trade Commission Act,[12] however the Sherman Act was utilized to show public policy in resolving what was unfair competition.[13] In speaking of the previously mentioned decisions, the Court stated:

> By these decisions it is settled that in prosecutions under the Sherman Act a trader is not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, . . . go beyond the exercise of this right and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.[14]

The Court found ". . . that the Beech-Nut system goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the *Colgate* case was held to be within the legal right of the producer."[15] But more importantly it stated: "The specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, which are

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[7] United States v. Colgate & Co., supra note 5, at 307.

[8] United States v. Schraeder's Son, Inc., 252 U.S. 85 (1920).

[9] The Court stated, id. at 99:

> It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers. . . .

[10] FTC v. Beech Nut Packing Co., 257 U.S. 441 (1922).

[11] United States v. Parke, Davis & Co., supra note 5, at 42; Report of the Att'y Gen's Nat'l Comm. to Study the Antitrust Laws at 134 (1955); Hanson, Maintaining Resale Price Through Refusals to Deal: A Re-examination, 2 B.C. Ind. & Com. L. Rev. 47, 51 (1960).

[12] 38 Stat. 719 (1914), 15 U.S.C. § 5 (1958).

[13] The Beech Nut Co. had a reporting system for policing price cutters who were placed on a "do not sell" list and who could only get back into good graces by giving assurances of obedience to suggested prices. Also involved was a system of marking so that those doing the policing could determine which distributor or wholesaler was supplying the price cutters.

[14] 257 U.S. at 452.

[15] Id. at 454.

quite as effective as agreements express or implied intended to accomplish the same purpose."[16] Thus the Court held that competition was suppressed and that the conduct of the company constituted a contract or contracts whereby resale prices were maintained.

In *United States v. Bausch & Lomb Optical Co.*[17] the Court found a price maintenance conspiracy where Softlite, a Bausch & Lomb distributor, had published price lists, licensed retailers, numbered certificates for tracing the product, price uniformity and a policy whereby wholesalers would be removed if they did business with unlicensed retailers.

Finally, the Supreme Court summed up all these cases with the last and limiting word on the *Colgate* doctrine in *Parke Davis*:

> The Sherman Act forbids combinations of traders to suppress competition. True there results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as Colgate is not overruled, this result is tolerated, but only when it is in the consequence of a mere refusal to sell in the exercise of the manufacturer's right 'freely to exercise his own independent discretion as to parties with whom he will deal.' *When the manufacturer's actions, as here, go beyond mere announcement* of his policy and the *simple refusal to deal*, and he *employs other means which effect adherence to his resale prices*, this countervailing consideration is not present and therefore he has put together a combination in violation of the Sherman Act.[18] (Emphasis added.)

When compared with the pricing policy and the activities of the manufacturers in *Parke Davis* and its predecessors, it is readily apparent that American was not in the same "league," not only because of the size of its operation but because of the methods employed and the fact that there was no intermediate wholesaler or distributor involved. Therefore, at first glance, it might seem that this court has gone too far and has been overly strict in applying the principles of *Parke Davis* to the facts. But that would avoid the obvious, for the court simply took the Supreme Court's language at face value, that all that would be allowed is a manufacturer's ". . . mere refusal to sell . . ." and if he uses ". . . other means which effect adherence to his resale prices . . . he has put together a combination. . . ."[19] Fortunately, the court did not confine the rules laid down in *Parke Davis* to the same type of fact situation found in that case, *i.e.*, a manufacturer—wholesaler—retailer relationship, as it easily could have.

Although American did not maintain a do-not-sell list, or an active and continuing espionage method to police its scheme, the court relied strongly on

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[16] Id. at 455.

[17] 321 U.S. 707 (1944).

[18] Supra note 5, at 44.

[19] The Parke, Davis Co. had an active program to maintain its prices. It solicited the aid of its distributors and encouraged them not to sell to price cutting retailers. The retailers themselves were sought out and advised of the policy. Assurances of price maintenance were sought and received from the retailers.

the repeated admonishments of the manufacturer's salesman, the complaints of the plaintiffs and its being cut off with refusal to reinstate without assurances of agreement. The court felt that any affirmative conduct beyond mere refusal and announcement induces concerted action among retailers, and thus the organization of a price maintenance conspiracy.[20]

The compelling motive for strictness is that resale price maintenance as was originally allowed by *Colgate* is precisely what is forbidden by Section 1 of the Sherman Act, except when operating under the various state fair trade laws as sanctioned by the Miller Tydings[21] and McGuire Acts.[22]

This court, as did the Supreme Court, recognized this contradiction and has indicated that it must be kept within the narrowest of bounds. Bounds so narrow that in a practical business situation, resale price maintenance founded on refusals to deal might not exist at all.[23] It would seem that to have a "refusal to deal" policy maintain prices effectively, *more* than announcement and refusal would be required, which is under *Parke Davis* a violation of the Sherman Act.[24]

It is submitted that the limitation that the Supreme Court put on the *Colgate* doctrine has been properly interpreted and applied, perhaps strengthened by a realization that inasmuch as price maintenance is contra to Congressional policy, such policy should take precedence over the manufacturer's right to refuse to deal.[25]

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[20] Klein v. American Luggage Works Inc., supra note 1, p. 76,434:

> This conclusion of illegality obtains because the manufacturer's resort to means beyond a prior announcement of terms sanctioned by a refusal to deal creates coercive pressures which are deemed as a matter of law to induce concert of action among adherent customers.

[21] 50 Stat. 693 (1927), 15 U.S.C. § 1 (1958).

[22] 66 Stat. 632 (1952), 15 U.S.C. § 45(a) (1958).

[23] The Supreme Court, 1959 Term, 74 Harv. L. Rev. 164, 166 (1960):

> It is clear that a seller may not threaten to stop supplying any wholesaler who sells to price cutting retailers and he probably may not discuss with his customers their prospective policies. But in theory he may still announce a suggested price schedule and stop dealing with those who violate it. Nevertheless, it seems realistic to conclude that resale price maintenance cannot successfully be accomplished without exceeding the very strict limitations imposed on the Colgate doctrine.

Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 856 (1955):

> Apart from statutory resale price maintenance, any systematic refusal to sell to dealers, who do not maintain suggested resale prices, which is made known to the trade would inevitably raise serious questions under the antitrust laws . . . .

See Note, 18 Vand. L. Rev. 1299, 1307 (1960).

[24] Warner & Co. v. Black & Decker Mfg. Co., 277 F.2d 787, 790 (2d Cir. 1960):

> The Supreme Court has left a narrow channel through which a manufacturer may pass, even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprises.

"Facts of Doric simplicity" were found in one case where a manufacturer cut off a retailer who was suing for treble damages under the Clayton Act. House of Materials Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2d Cir. 1962).

[25] The court's opinion comes quite close to a suggestion made in a recent article. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 689 (1962):

> If a manufacturer induces acquiesence by his distributors in a policy of resale

The court is in effect saying that a manufacturer may refuse to deal but this refusal cannot be the method to gain adherence to a resale price scheme because the coercive nature of refusal brings about concert of action.

It was also determined that a price maintenance conspiracy even though induced by refusals to deal imposes liability on the manufacturer and retailers, ". . . who adhered to specified prices with knowledge of the concerted nature of the scheme."[26] The court, however, was forced to admit: "while the validity of this proposition is not altogether free from doubt, the court is of the opinion that it is a correct statement of the law."[27] Liability thus attaches to all engaged in the conspiracy including the retailers.

The court relied on three cases, *Interstate Circuit*, *Masonite* and *U.S. Gypsum*,[28] to extend the *Parke Davis* rationale. In effect the court restated *Parke Davis*, *i.e.*, that agreement tacit or express is not necessary and that securing adherence to a scheme of maintenance constitutes a combination or conspiracy.[29] Because it was a "first," the court was constrained to completely develop its reasoning, and cited *U.S. Gypsum* for the principles contained in the three cases:

> . . . One of the things . . . (*Masonite* and *Interstate Circuit*) . . . establish is the principle that when a group of competitors enter into a series of separate but similar agreements with competitors or others a strong inference arises that such agreements are the result of concerted action. That inference is strengthened when contemporaneous declarations indicate that supposedly separate actions are part of a common plan. . . .[30]

Even though the Supreme Court has never ruled on this point, the decision should surprise no one. Perhaps it will be revisited or re-examined and be dubbed as a "trap," but the reasoning and the result that follows is quite proper on the present facts.[31]

Any remaining hope that, even with *Parke Davis*, resale price maintenance by refusal to deal might continue to be effective will certainly be dimmed by this decision.[32] It is submitted this is a fair following of the law and the policy laid down in *Parke Davis*. The policy and the purpose of the Sherman Act will no longer be frustrated by what might be described as

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price maintenance, he has created a series of tacit vertical agreements, and it seems wholly irrelevant to that conclusion that he obtained these tacit agreements by threats of refusal to deal, carried out against those who refused to acquiesce. . . .

[26] Klein v. American Luggage Works Inc., supra note 1, p. 76,434.

[27] Ibid.

[28] Interstate Circuit Inc. v. United States, 306 U.S. 208 (1939); United States v. Masonite Corp., 316 U.S. 265 (1942); United States v. United States Gypsum, 333 U.S. 364 (1948). See also, Rahal, Conspiracy and the Anti-trust Laws, 44 Ill. L. Rev. 743, 759 n.59 (1950).

[29] Supra note 5, at 43-44.

[30] Klein v. American Luggage Work Inc., supra note 1, p. 76,434.

[31] Id., p. 76,437 (Even though no express agreement between American and the retailers exists) "The court finds, however, that tacit understandings of crucial import between each defendant retailer on the one hand, and the manufacturer on the other, arose from the continued course of dealing between the parties."

[32] Hanson, 2 B.C. Ind. & Com. L. Rev., supra note 11, at 54.

a quirk in the anti-trust laws. It is suggested that a manufacturer wishing to have price maintenance should do so by the safe method under state fair trade laws.

JOSEPH L. COTTER

Constitutional Law—Ability of Domicile State to Tax Railway Rolling Stock.—*Central Ry. Co. of Pa. v. Pennsylvania*[1]—Appellant is a Pennsylvania corporation licensed to operate a railroad only in Pennsylvania. It owned 3,074 freight cars, upon which Pennsylvania had imposed an ad valorem property tax.[2] Appellant, in protesting the tax, claimed that during the tax year a daily average of more than 1,659 cars were entirely outside of Pennsylvania[3] and that 1,056 cars were used on lines which were only partly in Pennsylvania, but was unable to show in which particular states the cars were.[4] Appellant argued that the imposition of an unapportioned property tax on the property wholly or partly outside the taxing jurisdiction was violative of the commerce clause of the Federal Constitution and the due process provisions of the Federal and Pennsylvania Constitutions. On appeal from the trial court's judgment, the Supreme Court of Pennsylvania ruled that property which was not shown to have had an actual taxable situs elsewhere was subject to the taxing power of the domiciliary state.[5] On appeal to the Supreme Court of the United States, HELD: Absent any showing of the freight cars' regular routes through or habitual presence in particular non-domiciliary states, the domiciliary state may tax the personal property in full.

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[1] 370 U.S. 607 (1962).

[2] Pa. Stat. Ann., tit. 72 § 1871 (1936); "Every Domestic corporation . . . shall be subject to . . . a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds . . . ." Ibid. § 1901. "It shall be the duty of every corporation having capital stock . . . to make annually . . . a report . . . setting forth . . . .
First. The amount of its capital stock at the close of the year for which report is made, together with the highest selling price per share, and the average selling price thereof during said year.
. . .
Fifth. Its real estate and tangible personal property, if any, owned and permanently located outside of the Commonwealth, and value of the same; and the value of the property, if any, exempt from taxation."
While the tax would seem more akin to a capital stock tax, the Court's consideration is bound by the Pennsylvania Court's construction, Commonwealth v. Union Shipbuilding Co., 271 Pa. 403, 114 Atl. 257 (1921), of its being the equivalent of a property tax. N.Y. Central Ry. v. Miller, 202 U.S. 584, 595 (1906).

[3] Pursuant to the provisions of the Interstate Commerce Act, 24 Stat. 379 (1887), as amended, 49 U.S.C. § 1(4)(10)(12) (1958), appellant had entered into an agreement whereby its cars could be used by various other lines on a per diem rental basis. Appellant was in somewhat of an awkward position, as it did not know exactly where the individual cars had been; only that a particular out-of-state line had used them for a designated number of rental days.

[4] Appellant claimed that that stock which had been used by lines having a portion of their trackage in Pennsylvania should be taxed by Pennsylvania in the same proportion as the trackage in that state bears to the total trackage.

[5] 403 Pa. 419, 169 A.2d 878 (1961).